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This is a pre print version of the following article:

Original Citation:

Availability:

This version is available <http://hdl.handle.net/2318/1729434> since 2020-02-20T17:13:15Z

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In Italy the new Government was sworn in but a question comes up from the shadow: did the “Government of Change” start out by prompting a constitutional change?

by Dario Elia Tosi^[*]

In the last week, Italy overcame one of the deepest political turmoil of the last decades. The new Government and the parliamentary majority, which supports it, describe the new institutional layout as the “Government of Change”. Really, it constitutes something new in the landscape of the Italian political system. Indeed, as newspapers and media outlined, just from a constitutional point of view many original aspects already characterized the process that led to the formation of the new Executive branch. In this regard, a huge debate rose up between legal scholars if this event could itself represent a constitutional change or a break of constitutional provisions.

Given this context, regardless of the ‘change’ professed and predicted in the political programme - something that nobody now can really evaluate, and only in the future shall be assessed- one can try to outline if latest political elections and appointment of the new Government actually represent a turning point in Italian constitutional experience. In order to answer this question, first I’m going to sketch the layout of powers and actors involved in the formation process of the Executive branch. Then, I’ll briefly retrace latest constitutional chronicle, starting from last political elections and its original aspects. Finally, I’ll try to point out if actually the Italian system has experienced a constitutional change.

As all handbooks outline, the Italian Constitution provides for only a few and general rules on the Government formation procedure. Art. 92 states that Government is a compound subject “made up of the President of the Council and the Ministers who together form the Council of Ministers. The President of the Republic appoints the President of the Council of Ministers and, on his proposal, the Ministers”. According to Art. 93, from a juridical point of view, the Executive takes office after swearing an oath before the Head of State. After that, within ten days the Government has to receive (by a simple majority roll-call ballot) the vote of confidence of both Houses of Parliament on its political programme. Last but not least, with regard to the role of different actors involved in the formation of the Government, on one hand, it must be observed that Art.89 of the Constitution states that every act of the Head of State must be countersigned by the President of the Council or the submitting Minister. On the other hand, Art. 95 affirms that the President of the Council shall “conduct the general policy of the Government and shall be responsible for it”, as well as he shall ensure the unity of general political and administrative policies.

These two last dispositions are crucial in order to understand the real power of both the President of the Republic and the President of the Council. The requirement of the countersignature for the validity of Presidential acts takes the Head of State out of the ‘ordinary and daily’ political circuit running between other political actors: he’s a constitutional organ devoted to act as a guardian of the Fundamental Law and its values and an arbiter between political forces. Conversely, the President of the Council plays an effective role in outlining and fulfilling the majority political direction. Nevertheless, due to the traditional consociative scheme of the Italian parliamentary system, he cannot be compared to the Prime Minister as defined according to the Westminster model or the German Chancellor: his role is rather that of a *primus inter pares*. That is, the Government works

moving along a collegial pattern: given that, all the groups of the parliamentary majority are represented in the Council of Ministers; the President is vested with the power of coordinating and enforcing the majority political direction, rather than determining it. In this framework, constitutional history shows that his strength or weakness relies on his political leadership among other political actors.

The general role of the Head of State and President of the Council having thus cleared up, the decision of the *Framers* to outline only general rules on the formation process of the Executive branch, paved the way for customs and conventions or, merely, practices and habits. So, given the silence of the Constitution, when a Government resigns, regardless of its motivation (whether for a political crisis or general elections), the President of the Republic starts holding formal ‘consultation talks’ aiming at resolve the institutional crisis. The purpose of these talks is that of helping the Head of State in finding the right solution. Therefore, usually he consults essentially two groups of people. First of all, the President summons personalities, like former Presidents of the Republic or the Speakers of both the Houses of Parliament, who play or have played an important institutional role and can advice him. Secondly, the President convenes political leaders and spokespersons of parliamentary groups in order to receive their opinions/instances on the formation of a political majority and the appointment of the Government.

Due to his role of a *super partes* arbiter, if at the end of these talks the Head of State is not able to find a solution, he can move towards an ‘exploratory mission’ with the purpose to facilitate the creation of consent of political groups on a possible solution of the crisis. Usually, for this task, the President turns to one of the Speakers of the Houses of Parliament (indeed they are institutional organs but they’re also representatives of political groups in the Assemblies).

The enforcement of an electoral system with a majoritarian rule since 1990s till 2013 prompted a simplification of this stage of the procedure, being easier to outline a political majority in the aftermath of elections. Conversely, with a proportional system a greater variety of solutions lies open to the President of the Republic. This circumstance makes his work harder but, on the other hand, it gives him more discretion.

Having closed the first stage of the process, traditionally the Head of State convenes the political spokesman which consultation talks showed to be able to collect a majority consent and vests him with the task of sketching a political programme that can receive the confidence of the Parliament. The so called ‘President of the Council designate’ usually accepts the charge ‘with reserve’ in order to verify the feasibility to bring different political parties together on a political agreement and draw a potential government team. Once all doubts and problems have been overcome, the President designate comes back to the Head of State to dissolve the reserve and accept the task. In this circumstance, he explains the majority programme to the President of the Republic and proposes the list of Ministers. Then, an exchange of views opens up between these two actors. Relying on his role of guardian of the Constitution and its fundamental value, traditionally the Head of State examines the proposal of the President of the Council designate and gives him his assessment. It’s a very delicate stage of debate and negotiation: the margin of discretion for the Head of State depends on his political strength and the political solidity of the parliamentary majority and the leadership of the President designate. Due to the sensitivity of this phase, the debate is strictly reserved and only few indiscretions come out. Anyway, constitutional chronicles confirm the President of the Republic’s practice of giving advice on the programme and/or refusing some of the proposals on Ministers’ appointment. Mainly, his judgment aims at ensuring the compliance with the Constitution and avoiding cases of conflict of interest or solutions that, from a constitutional point of view, look inappropriate.

This stage having been concluded, the Head of State swears in the President of the Council and the Ministers, signing the Presidential Decrees of appointment that are countersigned by the President of Council himself. After the newly appointed Ministers having taken the oath, the Government takes office and starts working. Nevertheless, prior to the vote of confidence by both the Houses of Parliament, the political action of the Executive branch is restricted to ordinary administration.

That being said, the formation of the current Government reveals a certain degree of innovation with regard to the traditional procedure.

A first reason of that must be found in the existing electoral system. After 25 years of systems based on a more or less majoritarian rule, the present law moves along a proportional pattern. Nonetheless it's not a simple proportional model: the rule allows the presentation of pre-electoral coalitions and provides for the election of 1/3 of MPs in individual electoral constituencies. That has prompted some problems. Above all, the League, one of the parties of the current majority, decided to form a right-wing coalition with other political parties. Hence, its MPs were elected thanks to the vote of citizens that decided to support other groups of the coalition. Conversely to the past proportional system, where coalitions were only post-electoral, the presence of pre-electoral coalitions constituted a problem in attempting to find a majority. However, the founding of a political majority was troublesome even as a result of elections outcomes. Though a proportional rule, the political campaign moved along a majoritarian scheme (as it had been before the electoral reform) with parties affirming the possibility to get the majority of the Parliament seats and, therefore, solemnly avowing their refusal to look for post-electoral coalitions. This triggered several problems in the aftermath of elections when the Parliament showed to be split in three parts: 37% to the right-wing coalition; 32% to M5S; 26% to left-wing parties.

In the general turmoil, the League and the M5S started considering the possibility of an agreement that could gather M5S and the right-wing coalition. The outcome of such a dialogue was the election of the Speakers of the Houses of Parliament, respectively a spokesperson of M5S and one of Forza Italia (party headed by Silvio Berlusconi, a former President of the Council). Nevertheless, no one could actually foresee the end of the crisis and the birth of the Government. After one month from the elections, two rounds of consultation talks occurred but no solutions appeared. The initial openness between right-wing coalition and M5S seemed to vanish with a mutual veto of M5S on Berlusconi and vice versa. As a result of its electoral success, referring to the popular sovereignty principle, M5S pretended to be the pivot of the new Government. Hence, appealed for the support of the right-wing or, alternatively, left parties.

Having failed in his consultation talks, the President of the Republic moved towards the 'exploratory mission' solution. This represents another innovation with regard to the past. Indeed, conversely from precedent cases, the Head of State chose to set two different tasks. President Mattarella first vested the Speaker of the Senate (a spokeswoman of Forza Italia) with the task of exploring the feasibility of a right-wing-M5S agreement (that appeared to be more compliant with the outcome of the elections). Given the failure of this attempt, the President summoned the Speaker of the Chamber of Deputies to charge him with the mission of trying to set a left-wing-M5S majority. Some scholars have described these attempts as exploratory missions '*ad excludendum*'. However, despite its originality, this circumstance does not constitute a formal change in the formation procedure of the Executive branch. Actually, because of the fact that only a right-wing-M5S solution or a left-wing-M5S one was foreseeable, it seems that the Head of State decided to turn to his customary power in an atypical way only with the purpose of forcing the political debate and facilitating the end of the crisis.

Given the inability of political parties to find an agreement because of mutual vetoes, the President of the Republic stressed the importance of an Executive branch that could deal with European obligations deadlines. Hence, in the lack of a 'voluntary' majority, he announced his resolution to appoint a 'neutral Government' that would tackle the most urgent commitments and drive the Country to new political elections during the autumn or the beginning of 2019. However, President underlined that he hoped that in the meanwhile a political majority could emerge, so to avoid a new ballot.

The risk of another 'technocratic Government of the President' without a real political support triggered M5S and League party to consider the possibility of a two party majority. Here, one can observe noteworthy innovations with regard to the past. Indeed, traditionally consultation talks were directed to explore the feasibility of a political agreement and find the spokesman able to gather different parties on a general programme. This person, once appointed as President of the Council designate, would deal with setting foundations of a majority programme and outlining a proposal for a government team. All the debate usually rested on the conventional field of politics in a representative democratic system.

Conversely, in this case the scheme was different. The two parties involved in the deal started from antipodes: during the political campaign they refused to recognize each other, mutually criticizing their programme from the foundations. In this framework, a traditional political agreement was too hard to be concluded. Hence, the solution was that of a contract. Turning to comparison as an *argumentum quoad auctoritatem*, the two parties' political leaders recalled the German *Große Koalition* experience. Consequently, in a fortnight a steering group drafted a document made up of several provisions with the specific obligations that the new Government would have to fulfil. Differently from the past, in this case the points of the programme were not presented as a political commitment of majority parties; rather, they assumed the connotation of civil obligations.

From another perspective, unlike the consolidated practice, the definition of the programme pre-empted the agreement on the identification of the President of the Council. Moreover, two parties' leaders decided to resort to a 'neutral' and 'technical' profile. Overtaking their critics on previous technocratic Government made up of unelected people, they identified Mr. Giuseppe Conte, full professor of civil law but a political novice, as the key figure of the new Executive branch. Indeed, though unexpected, this solution seems to be the only feasible compromise between two subjects that started out from the antipodes and still do not completely trust each other. However, the subsequent weakness (if not substantial lack of legitimacy) of the President of the Council could have several consequences on the action of the Government.

An evidence of such a risk comes up from the following steps of the formation process of the current Executive branch. Informed of the agreement of League and M5S on the 'contract for the Government of change', President Mattarella summoned Mr Conte and charged him with the task of founding a new Government. Public opinion and media deemed crisis was finally going to an end. Unexpectedly, after few days the President designate came back to the Head of State to resign the mandate. The reason was the firm refusal of the President of the Republic to appoint as Minister of Economy the figure proposed by the President designate, due to previous statements expressed by the candidate on the EU and the Euro. At a closer inspection, the grounds of such an end were the inability of the President designate to propose a different solution as a result of the fact that the two main leaders of the majority strongly refused to take into account the Head of State's warnings and open to a different solution.

From a different point of view, the resolution of the Head of State has been interpreted as an important change in relation to the past. Some scholars deemed the President exceeded his role as arbiter outside of the political circuit running between Government and Parliament. Another group of academics,

stressing risks related to a possible 'Italexit', observed that his decision was compliant with his role of guardian of the Constitution, its values and the stability of the Country. A similar divide even characterized the political debate: while left-wing parties expressed their support for President Mattarella, the two parties that expressed the expected majority criticized its resolution. M5S went further, explicitly appealing for the impeachment of the Head of State. Moreover, this conflict risked to foster social tension. The political conflict became even harder because of the Presidential resolution to charge Mr. Carlo Cottarelli, a technocratic figure, with the task to create a neutral and caretaker Government. Indeed, this decision was grounded on the previous statement of the President on the need to postpone a new ballot after most urgent European deadlines.

In front of the determination shown by the Head of State, League and M5S returned to their bargaining in order to find a feasible solution. Informed of the new effort, consistently with his role of actor *super partes*, President Mattarella restrained Mr. Cottarelli, asking him to wait for the conclusion of the negotiation. Attempting to overcome the Presidential veto without expressly disavowing their former proposal, two parties' leaders advanced by means of Mr. Conte the idea of appointing the discussed figure for a less sensitive ministerial office. The President having accepted this new proposal, in the end the new Government was sworn in, took the oath and started working. Last but not least, in his first public declarations the new President of the Council defined himself as a loyal executor of the contract obligations, rather than the pivot of the Executive branch responsible for the coordination and enforcement of the majority political direction.

This huge turmoil being definitively over, the complex initial question remains pending: did the formation of the current Government represent a constitutional change or a violation of the Constitution? Regardless of any political evaluation, in the end it seems that no constitutional disruption or change really occurred. Though innovations in relation to the past were numerous, they did not infringe constitutional provisions or fundamental principles.

From a first point of view, it's undeniable that the Presidential resolution on the exploratory mission and his refusal on the Ministers' list presented by the President designate moved away from habitual practice. However, these decisions did not represent an interference on the majority political direction. Rather, the Head of State, as the highest defence against possible degeneration of the system, seemed to act with the only purpose of safeguarding the constitutional political direction or, in other words, fundamental values provided for by the Constitution (among others, the importance of the European integration process, stability of the Country and protection of citizens' savings). Even if the majority shows itself to be stable, the President must act in compliance with his duties.

From a different perspective, notwithstanding the noteworthy originality in the foundation of the political majority, definition of the programme and identification of the governmental figures, it can be said that innovations grounded on the peculiarity of the political framework come up in the aftermath of the elections. Though drawn up as a contract, in the end the programme keeps on holding only a political value; consequently, judgments on the Government will continue focusing on the principle of accountability, rather than that of liability. On the other hand, it's true that now the President of the Council looks like a pottery amphora between two steel urns and, consequently, plays the role of a loyal executor of a programme decided elsewhere. However, nobody can foresee whether the majority will get stronger or weaker. In the latter case, maybe the President of the Council will recover a bit of autonomy.

In conclusion, rather than a constitutional change or break, the formation process of the current Government has shown the great variety of solutions offered by the parliamentary system that the Italian Constitution provides for and, in the end, its capability to tackle so different political moments. In this framework, the only worrisome and bewildering matter was the tone of the conflict. A lot of

declarations made by political actors, as well as, private citizens were characterized by insults and offenses towards institutions, especially the Head of State, revealing a significant lack of the sense of State. On a close inspection, this loss of political culture, rather than the extemporaneous variations of the record that in this circumstance occurred, could really prompt a lamentable constitutional change ... hoping to be mistaken!

[*] Written on request of the editorial board